No. 79-1380

In The

Supreme Court of the United States

October Term, 1979

PATRICIA R. HARRIS, Secretary of Health and Human Services,

Appellant,

v.

CHARLES EDWARD WILSON, et al.

On Appeal from the United States District Court for the Northern District of Illinois

BRIEF OF THE ATTORNEYS GENERAL OF THE STATE OF NEW YORK AND THE COMMONWEALTH OF PENNSYLVANIA, *AMICI CURIAE,* IN SUPPORT OF THE JUDGMENT APPEALED FROM

ROBERT ABRAMS
Attorney General of the
State of New York
The Capitol
Albany, New York 12224
Telephone: (518) 474-7178

HARVEY BARTLE, III
Attorney General of the
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
Telephone: (717) 787-3391

Amici Curiae

SHIRLEY ADELSON SIEGEL
Solicitor General
State of New York

ALAN W. RUBINSTEIN
Assistant Attorney General,
State of New York
of Counsel

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BRIEF OF THE ATTORNEYS GENERAL OF THE STATE OF NEW YORK AND THE COMMONWEALTH OF PENNSYLVANIA, *AMICI CURIAE,* IN SUPPORT OF THE JUDGMENT APPEALED FROM

Interest of the State of New York

New York supports the right of its people who reside in public mental institutions to receive Supplemental Security Income for the Aged, Blind and Disabled (SSI) benefits. Specifically involved is their right to receive a monthly $25 SSI benefit paid to otherwise eligible persons residing in a hospital, extended care facility, nursing home or intermediate care facility but denied to them only because they reside in public mental institutions and are between 21 and 65 years of age. The $25 monthly SSI payment is for "small comfort items not supplied by the institution" (House Report No. 92-231 (1971) to accompany HR-1 of

1971, reprinted at 1972 US Code Cong. and Admin. News, p 4989 at p 5136). We argue for the proposition that there is no basis, in terms of people and their comfort, for treating patients residing in public mental institutions, who are federally disqualified from receiving such SSI benefit, differently from patients residing in other health care facilities, who do receive it.*

ARGUMENT

The classification here in issue is not only imprecise, it is wholly without any rational basis; there is no rationality in the nature of the class singled out.

The Court below held that "Congress could well conclude that public institution inmates are receiving all of the funds to which they are entitled" (Jur. St. 8a), citing *Dandridge v Williams*, 397 US 471 (1970). That case, however, did not "suspend the operation of the Equal Protection Clause in the field of social welfare law" (*Hagans v Lavine*, 415 US 528, 539 [1974]; see also *United States Dept. of Agriculture v Moreno*, 413 US 528 [1973]) and the classification must have a reasonable basis (*Graham v Richardson*, 403 US 365, 371 [1971]). These plaintiffs are deserving of this Court's special consideration for the reasons stated by the District Court.

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*New York, in recognition of the importance of the personal expense allowance, has, by statute, provided for such an allowance out of their SSI benefits to SSI beneficiaries who receive family care, residential care or care in a residential facility for the mentally retarded and whose SSI benefits would otherwise be used *in toto* to pay for such care (New York Social Services Law § 131-o; *Kupferman v Bd. of Social Welfare*, 66 New York AD2d 540 [3d Dept, 1979], affd 49 NY2d 742 [1980]). The allowance is "for his own use in obtaining clothing, personal hygiene items, and other supplies and services for his personal use not otherwise provided * * *" (§ 131-o[2]) and is deducted from the additional State payment component of the SSI grant (§ 131-o[1]).

A. *The Character of the Classification in Question**

Not all inmates of all public institutions receive the $25 stipend for small comfort items afforded by section 1611(e)(1)(B) of the Act (42 USC § 1382[e][1][B]). Those residing in public mental institutions do not receive it. No rational basis for their exclusion has been demonstrated.

The salutary purpose of the SSI program is "to provide supplemental security income to individuals who have attained age 65 or are blind or disabled" (§ 1601 of the Act, 42 USC § 1381). Since residents of public medical institutions (who receive the $25 stipend) and residents of public mental institutions (who do not receive it) are all disabled, they perforce would all qualify for the general SSI benefit were it not for exclusionary provisions.

We have in an appendix hereto traced the statutory history of those exclusionary provisions as to both cash assistance and medical assistance programs. It has been demonstrated that such exclusionary provisions, while now stated in Medicaid terms, are generally the same as have been in effect for the last thirty years as to both cash and medical assistance programs.** Those years

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*See *Dunn v Blumstein*, 405 US 330, 335 (1972):

> "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification."

**This is a cash assistance case and should be decided as such. There is neither need nor warrant to "examine the validity of the medicaid [exclusionary] scheme" as the Secretary suggests (Br, p 28). In any event its validity should not be determined in an action to which not a single state officer is a party (see *Legion v Richardson*, 354 F Supp 456 [SDNY, 1973], affd sub nom. *Legion v Weinberger*, 414 US 1058 [1973]). Extremely important and significant aspects of Medicaid "cooperative federalism" (*Harris v McRae*, ___ US ___, 100 S Ct 2671, 2683 [1980]) are involved which should not be decided upon the record now before the Court (cf. *Mt. Healthy City School District Bd. of Educ. v Doyle*, 429 US 274, 278 [1977]). This Court only recently has alluded to the Medicaid exclusion in a Medicaid context (*Harris v McRae, supra*, 100 S Ct at 2692, n 28); see also Mr. Justice STEVENS dissenting, 100 S Ct at 2715).

have seen the exlusion narrowed from all inmates of public medical institutions to those "living in public medical institutions . . . for mental diseases and tuberculosis" (Appendix p A-1). And the class, as to those living in public mental institutions has been further narrowed by conferring eligibility upon those 65 years of age and older and those under 21 years of age.

Congress has legislated in terms of "small comfort items" for persons living only in some public institutions but not in others. We urge that the statute has a substantial disparate impact upon those between 21 and 65 years of age residing in public mental institutions (*Califano v Boles*, 443 US 282, 294 [1979]). The classification here involved is unreasonable and arbitrary. It does not "rest upon some ground having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike" (*Johnson v Robison*, 415 US 361, 374 [1974]). The distinction in terms of small comfort items has no basis in practical experience (*McGinnis v Royster*, 410 US 263, 276 [1973]).

B. *The Individual Interests Affected by the Classification*

The New York experience demonstrates that those confined in public mental institutions could enjoy the comforts that the stipend would provide.

It is estimated that there are approximately 12,200 persons between the ages of 21 and 65 years of age who now reside in State mental health facilities. The length of stay of approximately 9,000 of their number is in excess of six months. The remainder is a turnover population whose average length of stay is approximately 24 days. Of the 9,000, it is estimated that 85 percent, or approximately 7,700 persons, would be eligible for SSI. Of the turnover population of approximately 3,000 persons, it is estimated that approximately 40% or 1,200 people would be eligible for SSI. Since, however, they happen to live in a public mental institution, they are ineligible to receive the SSI benefit.

Implicit in the congressional determination to deny the $25 monthly SSI stipend to residents of public mental institutions, is the assumption, totally unwarranted, that such persons do not need or cannot utilize the comfort items which residents of hospitals, extended care facilities, nursing home or intermediate care facilities are able to purchase with their $25 monthly stipend.*

Level of care surveys conducted by State Office of Mental Health staff indicate that patients receiving care at New York psychiatric centers (the name given to some State mental health institutions) are, to a great extent, ambulatory and fully capable of carrying out normal activities of daily living.**

Most patients have grounds privileges and are not confined to locked or closed wards. They are able to visit the facility's community store and purchase incidentals, snacks, personal care items, cigarettes or personal clothing items (items not provided by the state) that the patient may need to maintain his or her interest in life, to maintain personal appearance or to allow him or her to socialize with other patients.

Day passes for visits to shopping centers, stores or community recreational activities, usually in the company of a relative or a staff member, are also issued to patients.

State facilities have procedures and policies to safeguard and "bank" the private funds of the patients and to issue the patients money for the purchase of the type of items described above. A patient can draw on his or her account at will to make such personal purchases. It is a common practice for a patient's family to deposit moneys in such accounts during family visits, and for patients employed at the facility to have the cash

*If they are not senile or otherwise incapacitated.

**It is estimated that between 30% and 35% of persons living in such centers would be able to be cared for in adult residential facilities – rather than in a hospital setting – if such facilities had the available additional bed capacity.

compensation they earn deposited in their cash account. Income from other sources, such as pensions, social security or veterans' benefits, is also deposited in these accounts. Patients are encouraged and assisted in the proper handling of their own funds as part of the therapeutic process, an aim expressly recognized in the department's policy manual (State of New York, Department of Mental Hygiene, Department Policy Manual § 2730[A], "Patients Encouraged to Self-Determination").*

Persons who reside in state psychiatric centers are generally allowed to smoke, can read a magazine and have a piece of candy. Canteen trucks and ice cream trucks are generally permitted to come on state campuses. Residents of state psychiatric centers can enjoy all of these comfort items, to a greater or lesser degree, as much as any person who receives the stipend. But they are excluded simply because they reside in institutions for mental diseases and are between 21 and 65 years of age.

C. *The Exclusion Does Not Further a Legitimate Governmental Interest*

"Comfort" has been said to be synonymous with "amusement", "pleasure" and "happiness" (*Industrial Trust Co. v Commissioner of Internal Revenue*, 151 F2d 592, 594 [1st Cir, 1945], cert den 327 US 788 [1945]). It has been defined as a state of tranquil or moderate enjoyment resulting from satisfaction of bodily wants and freedom from care or anxiety; a feeling or state of well-being, satisfaction or contentment (*Equitable Trust Co. v Montgomery*, 28 Del Ch 389, 44 A2d 420, 423 [1945]). The term is not limited soley to necessaries of life but "may include things which bring ease, contentment and enjoyment" and is "something more than support, a minimum endurable standard of living" (*Strite v McGinnes*, 330 F2d 234, 239 [3d Cir, 1964], cert

*It is estimated that approximately one-third of the patients cannot handle money. Departmental personnel can, however, make their purchases for them.

den 379 US 836 [1964], citing Pennsylvania precedent; see, also *Blodget v Delaney*, 201 F2d 589, 593 [1st Cir, 1953]). There is simply no basis for discriminating between residents of public medical institutions and residents of public mental institutions in terms of furnishing a stipend to purchase "small comfort items."

It is no answer to say, as the Secretary does, that the denial of benefits "is rationally related to the legitimate legislative desire to avoid spending federal resources on behalf of individuals whose care and treatment are being fully provided for by state and local government units." (Br, p 27.) The Secretary has used "care and treatment" in a Medicaid context (see § 1905 of the Act, 42 USC § 1396d). The stipend has nothing to do with medical care and treatment. It is for "small comfort items not supplied by the institution" and is not intended for, nor may it be used to supply medical needs. A denial of these SSI benefits is not a denial of funds to a Medicaid facility; it is a denial of needed items to the disabled.

Having identified the need and generally provided for it, Congress cannot deny it to some individuals on the wholly irrational grounds of age (because they happen to be between 21 and 65) or the source of payment of their medical needs. "[T]he classification here in issue is not only 'imprecise' it is wholly without any rational basis." *United States Department of Agriculture v Moreno, supra*, 413 US at 538. There is no "rationality in the nature of the class singled out". *Rinaldi v Yeager*, 384 US 305, 308, 309 (1966).

CONCLUSION

The Judgment of the District Court should be affirmed.

Dated: Albany, New York
October 6, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York

HARVEY BARTLE, III
Attorney General of the
Commonwealth of Pennsylvania

Amici Curiae

SHIRLEY ADELSON SIEGEL
Solicitor General
State of New York

ALAN W. RUBINSTEIN
Assistant Attorney General,
State of New York
of Counsel

APPENDIX

APPENDIX
Statutory History of the SSI Exclusionary Provisions (§ 1611[e][1] of the Social Security Act, 42 USC § 1382[e][1])

In addition to the Aid to Families with Dependent Children program (AFDC, 42 USC §§ 601, *et seq.*) the Social Security Act, from its inception, contained assistance programs of Old Age Assistance (Title I, 42 USC §§ 301, *et seq.*) and of Aid to the Blind (Title X, 42 USC §§ 1201, *et seq.*). The term old age assistance as enacted in 1935 was defined to mean "money payments to aged individuals" (Social Security Act § 6, 74 Stat 622). Section 3(a) of that title provided for payment to states of federal assistance with respect to each individual who at the time of such expenditure was 65 years of age or older "and is not an inmate of a public institution" (74 Stat 621). So, too, Aid to the Blind was defined as meaning "money payments to blind individuals" (Social Security Act § 1006, 74 Stat 647) and section 1003 of the Act, as to payment to states, did not provide any federal payments for individuals who were inmates of a public institution (74 Stat 646). These provisions remained on the statute books, with only minor changes (53 Stat 1361, 1362, 1397, 1398) until 1950.

The report of the Committee on Finance of the United States Senate, No. 1669, to accompany H.R. 6000, dated May 17, 1950, reprinted at 1950 US Code Congressional Service, p 3287, stated (p 3347):

> "Under existing law, the Federal Government participates in the cost of assistance payments to aged and blind individuals residing in private but not in public institutions. Under the committee-approved bill, the Federal Government would share in the cost of payments to old-age assistance and aid to the blind recipients living in public medical institutions other than those for mental diseases and tuberculosis."

APPENDIX

Statutory History of the SSI Exclusionary Provisions (§ 1611[e][1] of the Social Security Act, 42 USC § 1382[e][1])

Thus it was that, as to Old Age Assistance, the prohibition against payment for individuals who were inmates of public institutions was transferred from the payment provisions of that title (Social Security Act § 3, 64 Stat 549) to the "definition" provision of the title (Social Security Act § 6, 64 Stat 549).*

The payment provisions of the Aid to the Blind program were changed in a like manner (64 Stat 553) as was the definition of the term "aid to the blind" (§ 1000 of the Social Security Act, 64 Stat 554). A fourth program of assistance, was added to the Act to provide aid to the permanently and totally disabled (Title XIV, Social Security Act, §§ 1401, *et seq.*, 64 Stat 555). The payment provisions thereof (*id.* § 1403, 64 Stat 556) and the definitional provisions thereof (*id.* § 1405, 64 Stat 557) tracked the Old Age Assistance provision.

For the first time Federal law provided for two kinds of asistance to the aged, the blind and the disabled. The first type was money (cash) payments "to" an individual. The second was payment for remedial care made "in behalf of" such an individual.

Such distinction, made manifest in 1950, was underscored in 1960 by the addition of the Medical Assistance for the Aged (MAA) program to afford certain care and services for in-

*"Sec. 6. For the purpose of this title, the term 'old-age assistance' means money payments to, or medical care in behalf of or any type of remedial care recognized under State law in behalf of, needy individuals who are sixty-five years of age or older, but does not include any such payments to or care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution) or any individual (a) who is a patient in an institution for tuberculosis or mental diseases, or (b) who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof."

APPENDIX
Statutory History of the SSI Exclusionary Provisions
(§ 1611[e][1] of the Social Security Act,
42 USC § 1382[e][1])

dividuals sixty-five years of age or older who were not recipients of old-age assistance (74 Stat 99). The trust of the 1950 provision, with amendments, was carried forward as to those receiving cash or care under the Old-Age Assistance Program (§ 6[a] of the Social Security Act) and inserted in the medical assistance provisions (*id.*, § 6[b], 74 Stat 991).

In 1962 Congress enacted a combined program of assistance whereby the states were given the option of combining their programs of Old Age Assistance (Title I), aid to the blind (Title X), and to the disabled (Title XIV) in a new program designated as Title XVI. The definitional terms of that program followed those of Titles I, X and XIV without major substantive change (76 Stat 204, 205, 207).

It was in 1965 that the Medicaid provisions were inserted in the Social Security Act (Public Law 89-97). Section 1905 (42 USC § 1396d) provided, *inter alia*, for payment of the cost of:

> "(15) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary; except that such term does not include—
>
> "(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or
>
> "(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases." (79 Stat 352)*

*Subdivision 15 was renumbered 17 and subdivision 16 was inserted (as to those under 21) by Public Law 92-603, § 299B, 86 Stat 1460.

APPENDIX
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The definitional terms of the cash assistance programs, other than those for old age assistance and for the combined program, were amended to follow the Medicaid definition (§ 1006, Aid to the Blind and § 1405, Aid to the Disabled; 79 Stat 358). The Old Age Assistance program and the combined program followed the Medicaid definition, taking into account, however, the care henceforth to be furnished to those over 65 (§ 6, 79 Stat 356, Old Age Assistance, § 1605, Aid to the Aged, Blind and Disabled, 79 Stat 358).

It was in 1974 (Public Law 92-603; 86 Stat 1329) that Titles I, X, XIV (and thus XVI as well) programs were, as to the 50 states (*id.* § 303, 86 Stat 1484) *, repealed and replaced by the new program of Supplemental Security for the Aged, Blind and Disabled, to be effective January 1, 1974, and also designated as Title XVI of the Social Security Act.

The disqualification of inmates of a public institution from receiving cash assistance is continued as to SSI recipients at section 1611(e)(1)(A) of the Social Security Act, 86 Stat 1467 (42 USC § 1382[e][1][A]), but the phrase "(except as a patient in a medical institution)" does not occur.

The disqualification of patients in a public institution for tuberculosis or mental diseases from receiving cash assistance (the $25 monthly stipend) is continued at section 1611(e)(1)(B), 86 Stat 1467 (42 USC § 1382[e][1][B]) because the Medicaid exclusions have been changed.

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*Section 303 provided that the new SSI provisions were not applicable in the case of Puerto Rico, Guam and the Virgin Islands and that the repeal of Titles I, X and XIV was not applicable as to them. Thus the programs and their definitional terms remain on the statute books to this day.